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House Judiciary Committee
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HB 447

HB 447 proposes amending Mont. Code Ann. § 2-3-144, the statute which relates to enforcement of rights under Article II, Section 8 of the Montana Constitution. Article II, Section 8 reads:

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

HB 447 proposes including a new subsection (2) requiring the award of costs and attorney fees to petitioners who prevail at any stage after filing a petition under MCA § 2-3-144 objecting to agency decisions as violating the right participate in agency operations.

Section 1. Section 2-3-114, MCA, is amended to read:

"2-3-114. Enforcement.

- (1) The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within 30 days of the date on which the petitioner learns, or reasonably should have learned, of the agency's decision.
- (2) A petitioner who prevails and obtains relief at any stage in an action brought in district court to enforce the petitioner's rights under Article II, section 8, of the Montana constitution must be awarded costs and reasonable attorney fees."

The Department does not suggest that Montana citizens can or should be denied their rights under Article II, Section 8, to a reasonable opportunity to participate in agency operations before final decisions, nor their right to file petitions under MCA § 2-3-144 objecting to any purported agency violations of the opportunity to participate. However, at least three reasons exist for voting against HB 447.

First, House Bill 447, appears to be a solution in search of a problem, and in this case, the solution itself may be the biggest problem. There isn't a record showing a significant number of cases alleging violations of Article II, Section 8. Two reasons suggest why this is so.

- (1) Government officers and employees attempt in good faith to fulfill their constitutional, legal and ethical duties; and
- (2) MCA § 2-3-144 provides a significant deterrent in allowing agency decisions made in violation to be set. No agency wants to go through that process and have to revisit an agency decision.

In the absence of a showing that the current statute has been unsuccessful in addressing violations, the question is why have an additional remedy?

Second, the remedy HB 447 proposes is inequitable and unreasonable.

- (1) While HB 447 requires the awarding of attorney fees and costs for petitioners who prevail, it does not provide for the same award when agency action is proven to have been correct, thus subjecting governmental agencies to financial risk without subjecting a petitioner to a similar risk, in even the most frivolous of circumstances.
 - (2) HB 447 requires the awarding of attorney fees and costs even in cases in which the petitioner ultimately loses. Generally, the party who ultimately prevails in any legal action is the party who is entitled to recover attorney fees and costs, if any party at all may. HB 447 turns that on its head.
- HB is so vaguely written that its requirement that attorney fees and costs be paid to a petitioner "who prevails and obtains relief at any stage" may be susceptible to an interpretation requiring attorney fees and costs be paid upon obtaining any relief, even the smallest relief, at any stage, even if petitioners do not prevail on the major parts of their petitions.

- HB 447 requires that a petitioner who prevails at district court, but who loses on appeal to the Montana Supreme Court, must nevertheless be awarded attorney fees and costs.
- HB 447 is so vaguely written that it can be read to require that a petitioner who prevails at the district court level only to be overturned at the Supreme Court level may nevertheless be awarded attorney fees and costs not only at the district court level, but for fees and costs incurred during the appeal. HB 447 does not clearly state otherwise.

Third, from the point of view of petitioners and their attorneys, HB 447 presents a "heads we win, tails you lose" framework. There may be no sweeter five words to the ears of attorneys than "mandatory attorney fees and costs", especially when, as under HB 447, there is no risk that the attorneys or their clients would ever risk paying attorney fees and costs. It would be surprising if adoption of the one-sided framework in HB 447 would not lead to an explosion of frivolous litigation under MCA § 2-3-144. HB 447 makes it more likely that whenever two or more are gathered, when those gathering are parties working in government, attorneys will find petitioners to litigate under MCA § 2-3-144, no matter how innocent the gathering.

For these reasons, the department urges a "No" vote on HB 447.